

REMARKS/ARGUMENT

Claims 1, 11-23, 33-38, 40-41, 44, and 46-54 are pending after entry of the present Amendment. In accordance with Applicants' Election of Claims, without traverse, in paper 11, Applicants herein cancel non-elected claims 55-62. Applicants reserve the right to pursue the subject matter of the canceled, non-elected claims in a timely filed Divisional Application. Claim 39 was previously canceled in the Preliminary Amendment filed January 24, 2002. In that same Preliminary Amendment, amended claims 1-38, 40-41, and 44-62 were filed. In addition, new claims 63-64 were submitted for examination. Applicants note that claims 42-43 were never canceled, and Applicants herein affirmatively cancel claims 42-43.

Applicants further note that non-final Office Action that is Paper No. 12 states that the Office Action is responsive to communication filed on 11 August 2000. Applicants respectfully submit that the Office Action *should* be in response to the Preliminary Amendment filed on January 24, 2002, and to the amended claims submitted therein. Since the Office Action identifies, on the cover sheet, claims 63 and 64 (the new claims submitted on January 24, 2002) as rejected, Applicants will assume that the correct claims have been examined, but Applicants request that the Office verify that an appropriate examination has been conducted.

In the present Amendment, Applicants herein cancel claims 2-10, 24-32, 42-43 (as noted above), 45, and 63-64. In addition, Applicants herein submit several claim amendments:

Claim 1 has been re-written to incorporate essentially all of the features previously recited in claims 1-10.

Claim 11 has been re-written in independent form and incorporates all of the features of the previous independent claim from which it depended.

Claim 12 has been amended to correct minor grammatical errors and to positively recite the "peer-to-peer" network feature, which is discussed in greater detail below.

Claim 14 has been re-written in independent form and incorporates all of the features of the previous independent claim from which it depended, as well as the former intervening dependent claim.

Claim 17 has been amended to correct minor grammatical errors and to positively recite the "peer-to-peer" network feature, which is discussed in greater detail below.

Claim 20 has been amended to correct dependency and to correct minor grammatical errors.

Claims 21 and 22 have been amended to correct minor grammatical errors and to positively recite the "peer-to-peer" network feature, which is discussed in greater detail below.

Claim 23 has been amended to incorporate all of the features formally recited in claims 23-32.

Claim 33 has been amended to positively recite the "peer-to-peer" network feature, which is discussed in greater detail below.

Claim 34 has been re-written in independent form and incorporates all of the features of the previous independent claim from which it depended, and additionally incorporates the features of former claim 35.

Claim 35 has been re-written in independent form and incorporates all of the features previously recited in claims 23-32, 34, and 35.

Claim 38 has been amended to correct a minor grammatical error.

Claim 41 has been amended to correct dependency, and to correct minor grammatical errors.

Claim 44 has been re-written in independent form and incorporates all of the features of the independent claim from which it previously depended.

Claim 46 has been re-written in independent form and incorporates all of the features of the independent claim from which it previously depended.

Claim 47 has been re-written in independent form and incorporates all of the features of the independent claim from which it previously depended.

Claim 48 has been amended to correct dependency and to positively recite the “means” feature as program instructions.

Claims 49-50 have been amended to positively recite the “means” feature as program instructions.

Claim 51 has been amended to positively recite the “means” feature as program instructions, and to make minor grammatical corrections.

Claim 52 has been amended to positively recite the “means” feature as program instructions.

Claim 53 has been re-written in independent form incorporating all of the features of the independent claim from which it previously depended, and to positively recite the “means” feature as program instructions.

Claim 54 has been amended to positively recite the “means” feature as program instructions, and to ensure antecedent bases support.

No new matter has been introduced. The claim amendments submitted herein essentially re-state, often in independent form, claim features previously recited in the amended or canceled claims, with some additional stylistic, grammatical, and antecedent bases amendments.

Rejections Under 35 USC §102

Former claims 1-3, 6-8, 10-14, 16, 19-21, 23-25, 28-30, 32-35, 40-41, 45-46, 48-50, 52, 54, and 61 were rejected under 35 USC §102(e) as being anticipated by Swildens et al. (US Patent Application Pub. No. US 2003/0065763). It would appear that former independent claim 64 was also rejected on this basis. Applicants respectfully traverse the rejections, and request reconsideration in light of claim amendments, and the following argument.

Applicants note this rejection is based on a patent application publication having a filing date after the filing date of the instant application, the reference being a *continuation-in-part* of a parent application also having a filing date after the filing date of the instant application, but the parent from which the continuation-in-part derives claims priority to multiple provisional applications filed less than 30 days prior to the instant application. Although Applicants submit that the cited references do not

anticipate the instant application, if the Office were to maintain the present or other rejections based on the same reference(s), Applicants request that the parent application from which the reference derives be provided to Applicants for consideration and to verify the priority of the disclosed matter.

Swildens et al. teach global traffic management of a typical client-server network system, exemplified by multi-server networks such as the Internet. Swildens et al. teach providing service metric probes to determine service availability and metric measurements of a plurality of services provided by content delivery systems. Latency probes determine the latency of various servers within the network, and the information is used to determine a server selection for a client to obtain content.

In order for a reference to anticipate a claim, *each and every element as set forth in the claim* must be found in the reference, either expressly or inherently described. MPEP 2131. The fact that words or phrases may be common to the reference and a claim is not enough. Each and every element must be found, and each and every element must be found as set forth in the claim. Applicant respectfully submits that Swildens et al. does not anticipate Applicants' claims as amended herein.

Although Applicants have always claimed features of and associated with a *peer-to-peer* network, previously submitted claims recited the peer-to-peer network in the preamble of the (independent) claims, which may have been interpreted as not being positively recited features. In Applicants' amended claims, the peer-to-peer network feature is positively recited at least in each of the independent claims, and is therefore a positively recited feature of the presently claimed invention. The architecture of a peer-to-peer network is fundamentally distinct from that of a client-server network as disclosed in Swildens et al., and the other references cited by the Office. Because of the fundamentally distinct architecture, the peer-to-peer network claimed by Applicants is not anticipated by the bits and pieces of features the Office was able to identify in the Swildens et al. reference that might correspond to Applicants' claimed peer-to-peer network. The following are just a few examples:

When Applicants claim, as in claim 1, the "selecting of at least one computer to be a selected computer, based on the selected data," Applicants claim the

selecting “within the peer-to-peer” network. In a peer-to-peer network, as is known, any of the plurality of computers within the peer-to-peer network can and do function as a client and as a server in the network. In the Swildens et al. reference, a selected computer is a selected server.

When Applicants form a profile which includes, for example, “information on a number of connected computers encountered by the signal during its travel to and from the at least one computer,” it is within the peer-to-peer network, and as is known, the architecture of the peer-to-peer network provides that network traffic transits through one or more computers connected to the network. This is not the case in a client-server network as described in Swildens et al., and although the Office asserts that the reference teaches this feature, a client-server network may have multiple computers connected, but a signal in a client-server network such as that taught by Swildens et al. does not “encounter” other computers as does the signal in the claimed peer-to-peer network. To state it another way, a “server load” such as taught by Swildens et al. may indicate the number of computers attached to a server, but it is not a number of connected computers *encountered by the signal during its travel*.

When Applicants claim monitoring data exchanges between the plurality of computers as in claim 11, Applicants have precisely and positively recited data exchange between a plurality of computers within the peer-to-peer network. The Swildens et al. reference teaches data provided a client from a server, but in the client-server environment of the Swildens et al. reference, servers provide content to clients, and clients request content of a global traffic manager that identifies a server to provide the content to the client. Again, in the peer-to-peer environment, any of the plurality of the network computers can be either client or server, and so data exchange between computers is truly multi-path, dynamic, data exchange *between* computers. Swildens et al. does not teach this feature.

The Office states that Swildens et al. teach “sending a common user search query into the network on a periodic basis,” and cite page 1, paragraph 13, page 6, paragraph 90, and page 15, paragraph 357. Cited paragraph 13 teaches a metric test result update, paragraph 90 teaches cache periodic checking, and paragraph 357 teaches

cache checking. None of the cited paragraphs appear to teach or disclose the sending of a common user search query into the network on a periodic basis.

The above cited examples are representative of the many features that a client-server network such as that taught in the Swildens et al. reference simply do not teach or disclose about a peer-to-peer network such as claimed by Applicants. Swildens et al. therefore do not teach each and every element as set forth in Applicants' claims.

Applicants respectfully submit that the Swildens et al. reference does not anticipate Applicants' claims 1, 11-23, 33-38, 40-41, 44, and 46-54, as amended herein, and therefore request that these rejections be withdrawn.

Rejections under 35 U.S.C. §103

Applicants claims 4, 5, 9, 11, 15, 17, 18, 22, 26, 27, 31, 36, 37, 42-43, 44, 47, 51, 53, and 63, were rejected under 35 USC §103 (a) as being unpatentable over Swildens et al., in view of, variously, Carpenter (US Patent No. 6,339,785), Sieffert et al. (US Patent No. 6,594,662), Welder (US Patent No. 6,473,855), Carpenter in further view of Nagae (US Patent No. 6,006,248), Scharber (US Patent No. 6,542,964), Ishikawa (JP 11015707A), and Adams (US Patent No. 6,055,568). Each and every one of the claim rejections are traversed, and Applicants request reconsideration in light of claim amendments and argument.

In each of the rejections asserted by the Office, the Swildens et al. reference is used to assert a rejection of the features of an underlying independent claim, and then the additional references are combined with the Swildens et al. reference to capture additional features recited in the dependent claims. As described above, Applicants have herein amended, at least, each of the independent claims (1, 11, 14, 23, 34, 35, 44, 46, 47, and 53) to positively recite a peer-to-peer network. Neither Swildens et al., nor any of the cited additional references teach or disclose a peer-to-peer network. Additionally, as described above, the Swildens et al. reference does not teach a number of the features recited in Applicants' independent claims, and the Office makes no assertion that any reference other than Swildens et al., alone or in combination with additional references, teaches the features of, for example, a peer-to-peer network, a number of connected


computers *encountered* by the signal during its travel to and from the at least one computer, monitoring data exchange *between* the plurality of computers, etc.

To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine the reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art references when combined must teach or suggest all the claim limitations. (MPEP §2143). Applicant respectfully submits the Office has failed to establish a *prima facie* case of obviousness against Applicants' claimed invention.

For at least the reason that, in Applicants' claimed peer-to-peer network, the combinations of references as asserted by the Office fail to teach or suggest all the claim limitations, none of the various reference combinations renders Applicants' claimed invention obvious. Applicants therefore request that all of the §103 rejections be withdrawn.

In view of the foregoing, Applicants respectfully request reconsideration of claims 1, 11-23, 33-38, 40-41, 44, and 46-54, as amended herein. Applicants submit that all claims are in condition for allowance. Accordingly, a notice of allowance is respectfully requested. If Examiner has any questions concerning the present Amendment, the Examiner is kindly requested to contact the undersigned at (408) 749-6900, ext. 6905. If any additional fees are due in connection with filing this amendment, the Commissioner is also authorized to charge Deposit Account No. 50-0805 (Order No. ROXIP280). A copy of the transmittal is enclosed for this purpose.

Respectfully submitted,
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